

### Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

UNPUBLISHED

Please use FIND to look at the applicable circuit court rule before citing this opinion. Fourth Circuit Rule 36(c). (FIND CTA4 Rule 36(c).)

United States Court of Appeals,  
Fourth Circuit.  
UNITED STATES of America, Plaintiff-Appellee,  
v.  
Charles Gilbert MURPHY, Defendant-Appellant.  
**No. 00-7104.**

Submitted Dec. 8, 2000.  
Decided Jan. 4, 2001.

Federal inmate filed motion to vacate, set aside, or correct his sentence. The United States District Court for the Eastern District of North Carolina, [James C. Fox](#), J., denied motion, and inmate appealed. The Court of Appeals held that counsel's failure to note requested appeal was presumptively prejudicial.

Affirmed in part, vacated in part, and remanded.

West Headnotes

#### [1] Criminal Law **641.13(7)**

##### 110k641.13(7) Most Cited Cases

Counsel's failure to note requested appeal is presumptively prejudicial. [U.S.C.A. Const.Amend. 6.](#)

#### [2] Criminal Law **641.13(7)**

##### 110k641.13(7) Most Cited Cases

To prevail on ineffective assistance of counsel claim for failing to note appeal, defendant did not need to demonstrate that his hypothetical appeal might have had merit, but rather only that but for counsel's deficient conduct, he would have appealed. [U.S.C.A. Const.Amend. 6.](#)

\***111** Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. [James C. Fox](#), District Judge. (CR-99-33, CA-00-497).

Charles Gilbert Murphy, pro se. Scott L. Wilkinson, Office of the United States Attorney, Raleigh, NC, for appellee.

Before [WIDENER](#), [MICHAEL](#), and [KING](#), Circuit Judges.

### OPINION

PER CURIAM.

Charles Gilbert Murphy appeals the district court order dismissing his [28 U.S.C.A. § 2255 \(West Supp.2000\)](#) motion. The district court summarily dismissed Murphy's motion pursuant to Rule 4(b) of the Rules Governing [Section 2255](#) Proceedings for the United States District Courts, [28 U.S.C.A. § 2255](#). We deny a certificate of appealability and dismiss the appeal as to all of Murphy's claims excepting one. As to Murphy's claim that he was denied effective assistance of counsel because counsel failed to file a notice of appeal despite being requested to do so, we grant a certificate of appealability and vacate the court's \***112** order as to that claim and remand for further proceedings.

[\[1\]\[2\]](#) The district court determined that because Murphy waived his right to appeal his sentences and convictions except for claims regarding ineffective assistance of counsel and prosecutorial misconduct not known at the time he pled guilty, Murphy was not prejudiced by counsel's failure to note an appeal because an appeal would have been futile. Counsel's failure to note a requested appeal is presumptively prejudicial, however. See [Roe v. Flores-Ortega](#), [528 U.S. 470](#), [120 S.Ct. 1029](#), [1038-39](#), [145 L.Ed.2d 985](#) (2000); [United States v. Witherspoon](#), [231 F.3d 923](#), [925-27](#) (4th Cir.2000) ("[a]n attorney who fails to file an appeal after being instructed by his client to do so is per se ineffective"); [United States v. Peak](#), [992 F.2d 39](#), [42](#) (4th Cir.1993). In *Roe*, the Supreme Court found that when counsel's conduct renders the appellate proceeding non-existent, prejudice is presumed and the

defendant is not required to show that the appellate proceeding would have presented meritorious claims. *See id.* Thus to prevail on an ineffective assistance of counsel claim for failing to note an appeal, a defendant need not "demonstrate that his hypothetical appeal might have had merit," but rather only that "but for counsel's deficient conduct, he would have appealed." [Roe, 120 S.Ct. at 1040.](#)

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Accordingly, we grant a certificate of appealability in regard to Murphy's claim that he was denied effective assistance of counsel because counsel failed to file a requested notice of appeal. [\[FN1\]](#) We vacate the court's order as to this claim and remand for further proceedings. As for Murphy's remaining claims, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. *See United States v. Murphy*, Nos. CR-99- 33; CA-00-497 (E.D.N.C. July 27, 2000). [\[FN2\]](#) We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

[FN1.](#) We express no opinion as to the merits of this claim.

[FN2.](#) Although the district court's order is marked as "filed" on July 26, 2000, the district court's records show that it was entered on the docket sheet on July 27, 2000. Pursuant to [Rules 58](#) and [79\(a\) of the Federal Rules of Civil Procedure](#), it is the date that the order was entered on the docket sheet that we take as the effective date of the district court's decision. *See Wilson v. Murray*, 806 F.2d 1232, 1234- 35 (4th Cir.1986).

*DISMISSED IN PART; VACATED AND REMANDED IN PART.*

1 Fed.Appx. 111

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- [00-7104](#) (Docket)  
(Aug. 14, 2000)

**Unpublished Disposition**

(Cite as: 134 F.3d 364, 1998 WL 45440 (4th Cir.(N.C.)))

**Briefs and Other Related Documents**

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA4 Rule 36 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Kirk K. COTTLE, a/k/a Curtis Williams, a/k/a Kurt

Cottle, a/k/a Kurt Bullock,

a/k/a K, a/k/a K Dog, a/k/a Kool Aid,

Defendant-Appellant.

**No. 97-6171.**

Submitted Dec. 17, 1997.

Decided Feb. 6, 1998.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. [James C. Fox](#), District Judge. (CR-93-69-F, CA-96-956-5-F)

Kirk K. Cottle, Appellant Pro Se.

[Robert Edward Skiver](#), Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Before [MURNAGHAN](#), [WILKINS](#), and [MOTZ](#), Circuit Judges.

## OPINION

PER CURIAM.

**\*\*1** Kirk Cottle appeals the district court's order denying his motion to vacate, set aside, or correct his sentence under [28 U.S.C.A. § 2255 \(West 1994 &](#)

[Supp.1997\)](#). Cottle is incarcerated pursuant to his guilty plea to one count of possessing with intent to distribute crack cocaine, in violation of [21 U.S.C. § 841\(a\)\(1\) \(1994\)](#), and one count of carrying a firearm, in violation of [18 U.S.C. § 924\(c\) \(1994\)](#). In this action, he challenges the validity of his conviction in light of the Supreme Court's decision in [Bailey v. United States](#), [516 U.S. 137, 116 S.Ct. 501 \(1995\)](#), the court's calculation of his sentence and failure to inform him of his appeal rights, and whether he received effective assistance of counsel.

Initially, we note that Cottle's reliance on *Bailey* is misplaced. In his plea agreement, Cottle explicitly admitted to *carrying* a firearm in relation to a drug trafficking crime. In fact, it appears from the record that Cottle himself insisted that the word "use" be struck from the plea agreement and the word "carry" inserted in its place to clarify that he carried but did not use the gun in question. As *Bailey* did not alter the construction of the "carry" prong of [§ 924\(c\)](#), that decision has no affect on Cottle's conviction.

Cottle next contends that the district court erred by sentencing him for trafficking in "crack" cocaine, rather than powder cocaine. This claim is foreclosed by Cottle's voluntary waiver of his right to challenge his sentence directly or collaterally in his plea agreement.

See [United States v. Wiggins](#), [905 F.2d 51, 53 \(4th Cir.1990\)](#). Moreover, we note that the plea agreement plainly states that Cottle possessed with intent to distribute the "crack" form of cocaine. Because any challenge to Cottle's sentence on this basis would therefore have been frivolous, we reject Cottle's claim that his attorney's failure to make such a challenge constituted ineffective assistance of counsel. See [Strickland v. Washington](#), [466 U.S. 668, 694 \(1984\)](#).

Cottle's remaining contentions relate to his appeal rights. Contrary to Cottle's assertion, the district court bore no obligation to inform him of his appeal rights, in light of his guilty plea. See [Federal Rule of Criminal Procedure 32\(a\)\(2\)](#); [Carey v. Leverette](#), [605 F.2d 745, 746 \(4th Cir.1979\)](#). In any event, Cottle was on notice

as to his appeal rights because they were prominently discussed in his plea agreement.

Cottle further maintains, however, that his attorney refused to carry out his request that he file a direct appeal. If true, such failure would constitute ineffective assistance of counsel under our decision in [\*United States v. Peak\*, 992 F.2d 39, 42 \(4th Cir.1993\)](#).

The record discloses conflicting evidence bearing on this issue. The Government provided an affidavit from Cottle's attorney stating that he and Cottle discussed the pros and cons of an appeal and that *Cottle* decided not to pursue an appeal. The record also contains, however, verified statements by Cottle directly contradictory to his attorney's affidavit.

**\*\*2** Because the district court did not resolve this issue, we vacate the court's order and remand for the limited purpose of permitting the court to make the requisite factual findings. In all other respects, the order of the district court is affirmed. We therefore grant a certificate of appealability with respect to the *Peak* issue, but deny a certificate of appealability as to all remaining issues. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

*AFFIRMED IN PART, VACATED IN PART, AND REMANDED*

134 F.3d 364 (Table), 1998 WL 45440 (4th Cir.(N.C.)), Unpublished Disposition

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- [97-6171](#) (Docket)  
(Feb. 06, 1997)

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